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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 589

LOREN L. LANDMAN, ET AL.,
Appellants,

v.

ROBERT MIEDZINSKI, SHERIFF OF ST. MARY'S COUNTY, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully move this Honorable Court to dismiss the above entitled appeal or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that the appeal fails to present any substantial federal question.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported in 218 Md. 3, 145 A. 2d 220.

STATEMENT

This is a direct appeal from the final judgment of the Court of Appeals of Maryland, dated October 15, 1958, holding Chapter 18 of the Acts of 1958 (Maryland Legislature) to be constitutional and valid. The judgment of the Court of Appeals of Maryland reversed a decree of the Circuit Court for St. Mary's County and ordered that court to enter a decree holding Chapter 18 constitutional and valid, which was entered on October 28, 1958.

House Bill No. 57 was passed by the General Assembly of Maryland at the 1958 session and signed into law as Chapter 18 by the Governor on March 6, 1958. Chapter 18 adds a new section to Article 27, Annotated Code of Maryland, and reads as follows:

> "246A. (a) It shall be unlawful for any person, firm, association or corporation to bet, wage or gamble at or to keep, conduct, maintain or operate any game of chance, gaming table or coin operated gambling machine or device upon any vessel upon any of the waters within the State of Maryland, or upon any pier, wharf, building or other structure of any kind whatsoever which is built upon or over any of the waters of this State and which pier, wharf, building or other structure cannot be entered from the shore of the State of Maryland by a person on foot, and it shall further be unlawful for any person, firm, association or corporation to establish, keep, rent, use or occupy, or knowingly suffer to be established, kept, rented, used or occupied, any vessel upon any of the waters of the State of Maryland, or any pier, wharf, building or other structure of any kind whatsoever which is built upon or over any of the waters of this State and which cannot be entered from the shore of the State of Maryland by a person on foot, for the purpose of conducting, maintaining or operating any game of chance, gaming table or coin operated gambling machine or device. This Section shall prevail despite the issue of any form

of license or permit granted through or by any county, municipal corporation or other political subdivision of this State. Any person, firm, association or corporation violating the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than Two Hundred Dollars ($200.), or more than One Thousand Dollars ($1,000.), or imprisonment not to exceed one year for each such violation or may be both fined and imprisoned in the discretion of the court.

"(b) Nothing in this Section shall be construed to authorize the doing of any act which is otherwise prohibited by law."

On May 21, 1958, a Bill of Complaint was filed by the Appellants, requesting the Circuit Court for St. Mary's County to determine and establish the constitutionality and validity of Chapter 18 and to enjoin the Appellees and all other law enforcement officers from enforcing such law when it was to take effect on June 1, 1958. A temporary restraining order was signed by the court, which restraining order was extended after an answer had been filed for the Appellants on May 28, 1958, and the case was set for hearing on June 13, 1958.

The Appellants contended that Chapter 18 of the Acts of Maryland of 1958 was invalid and unconstitutional for the following reasons:

1. That it was enacted in violation of Section 15 of Article III of the Maryland Constitution.

2. That it violated the Fourteenth Amendment of the Constitution of the United States.

3. That it is unenforceable because it is ambiguous and inconsistent.

The Circuit Court for St. Mary's County, in their opinion, held that Chapter 18 was unconstitutional since it violated

Section 15 of Article III of the Maryland Constitution, but found that the Act did not violate the United States Constitution.

The Appellees appealed to the Maryland Court of Appeals from this judgment and the Maryland Court of Appeals, after advancing argument in the case, reversed the Circuit Court on October 15, 1958, and ordered that the case be remanded so that a decree holding the Act constitutional and valid could be entered. On October 20, 1958, the Appellants filed a motion for stay with the Maryland Court of Appeals, which was denied the next day. An Application for Stay was then immediately filed with this Court and was denied by the Honorable Chief Justice on October 25, 1958.

Thereafter, the Appellants retained new counsel who filed an appeal in this Court and filed an Amended and Supplemental Application for Stay in this Court on December 17, 1958, which stay was denied on December 22, 1958 by the Honorable Justice Brennan.

ARGUMENT

The decision of the Court of Appeals of Maryland is plainly correct and no substantial federal question is presented in the appeal. Prior to the enactment of Chapter 18, all forms of gambling were prohibited in Maryland (Article 27, Section 237, Annotated Code of Maryland (1957 Ed.)), except in four counties where certain types of gambling are lawful if licensed by the county. The 1958 statute here in controversy does not change this but prohibits gambling on any vessel upon the waters of the State of Maryland or upon any pier, wharf, building or other structure which is built upon or over the waters of this State and which structure cannot be entered from the shore of the State of Maryland by a person on foot.

The Appellants allege that they have been denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States because Chapter 18 of the Acts of 1958 discriminates against them without proper classification.

There is no question that the equal protection clause does not preclude the States from reasonable classification for the purpose of legislation. It is only when such attempted classification is arbitrary and unreasonable that the courts can declare it beyond the legislative authority. *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 59 L. Ed. 364.

At the outset it is to be observed that it is elementary that every presumption is to be indulged in favor of the validity of a legislative enactment and that the courts will not invalidate a statute until this presumption is overcome beyond a reasonable doubt. "The presumption of reasonableness is with the State." *Salsburg v. Maryland*, 346 U.S. 545, 98 L. Ed. 281.

In *Screws v. United States*, 325 U.S. 91, 89 L. Ed. 1495, this Court pointed out that an unconstitutional construction is to be avoided if possible, stating:

> "This Court has consistently favored that interpretation of legislation which supports its constitutionality. Aschwander v. Tennessee Valley Authority, 297 U.S. 288, 30 L. Ed. 688; National Labor Relations Board v. Jones L. Steel Corp., 301 U.S. 1, 81 L. Ed. 893. * * *"

See *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 465, 89 L. Ed. 1725, 1737; *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 510, 81 L. Ed. 1245, 1253.

In *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584, 79 L. Ed. 1070, 1072, Justice Stone said:

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the bur-

den of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. Rast v. Van Deman & L. Co., 240 U.S. 342, 357, 60 L. Ed. 679, 687, 36 S. Ct. 370, L.R.A. 1917A, 421 Ann. Cas. 1917B, 455; State Tax Comrs. v. Jackson, 283 U.S. 527, 537, 75 L. Ed. 1248, 1255, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536."

In *Fort Smith L. & T. Co. v. Board of Imp. of Paving Dist.*, 274 U.S. 387, 71 L. Ed. 1112, it was held that a street railway company was not deprived of the equal protection of the laws where it was required to pay a State paving assessment which was not imposed upon companies operating in other municipalities. The Court enumerated various conditions which it assumed might exist which would justify the discrimination, and said at page 392 of 274 U.S.:

"* * * We may not assume in the absence of proof that such differences do not exist. Erb v. Marasch, 177 U.S. 584, 586, 44 L. Ed. 897, 898, 20 Sup. Ct. Rep. 819; Middleton v. Texas Power & Light Co., 249 U.S. 152, 158, 63 L. Ed. 527, 531, 39 Sup. Ct. Rep. 227; Swiss Oil Corp. v. Shanks, 273 U.S. 407, ante, 709, 47 Sup. Ct. Rep. 393.

"There are no facts disclosed by the record which would enable us to say that the legislative action with which we are here concerned was necessarily arbitrary or unreasonable or justify us in overruling the judgment of the state court that it was reasonable. Durham Pub. Serv. Co. v. Durham, supra, 154 (67 L. Ed. 585, 43 Sup. Ct. Rep. 290)."

The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 573. The rules for testing a discrimination have been summarized as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79, 55 L. Ed. 369, 377, Ann. Cas. 1912C, 160. See *Morey v. Doud*, 354 U.S. 457, 1 L. Ed. 2d 1485.

The Maryland Court of Appeals in *Salsburg v. State*, 201 Md. 212, 221, 94 A. 2d 280, aff. 346 U.S. 545, 98 L. Ed. 281, followed this rule in holding:

> "* * * In so far as a statute grants privileges to or places burdens upon an individual, or limits his rights especially his right to engage in a particular business or occupation, such statute may be invalidated by an arbitrary or unreasonable classification or discrimination in respect to territory. *Herbert v. County Comm'rs. of Baltimore County*, 97 Md. 639, 644, 55 A. 376; *Watson v. State*, 105 Md. 650, 655, 66 A. 635; *Clark v. Harford Agricultural & Breeders' Assn.*, 118 Md. 608, 620, 85 A.

503; *Criswell v. State*, 126 Md. 103, 109, 94 A. 549. The classification must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, and the law shall apply equally to all persons similarly situated within the territory described in the act. *Ocampo v. United States*, 234 U.S. 91, 34 S. Ct. 712, 715, 58 L. Ed. 1231; *Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 40 S. Ct. 560, 64 L. Ed. 989; *Ft. Smith Light & Traction Co. v. Board of Improvement*, 274 U.S. 387, 47 S. Ct. 595, 597, 71 L. Ed. 1112. The classification is presumed to be reasonable in the absence of clear and convincing indications to the contrary, and the person attacking the classification has the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369."

In *Arizona v. Double Seven Corporation*, 70 Ariz. 287, 219 P. 2d 776, 19 A.L.R. 2d 1007, the corporation was charged with violation of a statute requiring horsemeat slaughtering for human consumption to be done in an establishment separate and apart from other livestock, to be stamped and sold from separate compartments. The constitutionality of the statute was raised before the court. The court said:

> "The burden of proof as to the constitutionality of a statute rests upon the defendant who appeals its unconstitutionality * * * Every reasonable doubt is to be resolved in favor of the constitutionality of legislative enactments and before a statute be declared unconstitutional it should clearly appear that it cannot be upheld by any reasonable intendment or presumption."

Under Chapter 18 of the Acts of 1958, all persons in the State of Maryland are affected exactly alike in respect to conducting gambling upon any pier, wharf, building or other structure of any kind whatsoever which is built upon

or over any of the waters of the State, which cannot be entered from the shore of the State of Maryland by a person on foot. The Act does not distinguish between one person and another, but makes it a crime for anyone to commit the forbidden acts. All persons similarly situated in the State are affected by Chapter 18 in exactly the same manner; there is no discrimination. The Act does make a distinction between places of business on the mainland or on piers, wharves or vessels adjacent thereto, and piers, wharves or vessels on the water of the State which cannot be reached on foot from the shore of Maryland, but an Act need not be territorially equal as long as it applies equally to all persons similarly situated within the territory described in the Act. However, we submit that such classification, if it is a classification, is reasonable in that the latter locations are more difficult to police, and further that in regard to the present case, they infringe upon the policies of the neighboring Commonwealth of Virginia.

In considering the constitutional safeguards, the courts must give regard to the principle that the State may regulate and restrict the individual whenever it is essential to protect the public safety, health or morals. If there is some reasonable basis, however slight, for a classification, then it must be permitted to stand. The classification made by Chapter 18 was reasonably related to the object sought to be achieved by the Maryland Legislature in the exercise of its police power. The location of gambling devices upon or over waters which cannot be reached from the shores of Maryland by a person on foot make it quite difficult to police and supervise the operation thereof by the proper State of Maryland and county authorities. It necessitates a long trip by land or the use of boats, neither of which are convenient for the policing of the devices. The gambling business is of such a nature that it is a necessary and proper subject of regulation under the State's police power.

In *Maryland Coal & Realty Co. v. Bureau of Mines of State*, 193 Md. 627, 69 A. 2d 471, the Court of Appeals of Maryland had before it the strip mining act of the laws of 1947, which act was held to be unconstitutional because it discriminated between operators of coal mines in Garrett County and those in Allegany County, Maryland. However, the Court said, in order to justify the State in interposing its authority for the public welfare, it must appear first that the interest of the public generally, as distinguished from the members of a particular class require such interposition; and second, that the means adopted are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individual citizens. The design and purposes of the act have a real and substantial relation to the police power. The court again pointed out that it is not the purpose of the equal protection clause to take from the State the power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the authority of the Legislature.

The Court of Appeals quoted from the case of *United States v. Carolene Products Co.*, 304 U.S. 144, 82 L. Ed. 1234, where the Supreme Court said:

> "The Fifth Amendment has no equal protection clause and even that of the Fourteenth applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found even though it has failed to strike at another. * * *"

It is submitted that Chapter 18 is a valid exercise of the police powers of the State and operates alike upon all persons and property under the same circumstances and conditions, and is reasonably related to the object to be achieved by the Legislature.

The Appellants admit in their Brief, page 14, that the complaint did not "in haec verba" refer to the due process clause nor did the trial court or the Court of Appeals rule on this ground. However, the Appellants allege that Chapter 18 violates their rights under the due process clause of the Fourteenth Amendment. They allege that the statute deprives them of their liberty to engage in a lawful business and destroys the property they have invested in the business.

This Court, in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 99 L. Ed. 563, stated that "the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." See *Nebbia v. New York*, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; *Olsen v. Nebraska*, 313 U.S. 236, 85 L. Ed. 1305, 61 S. Ct. 862, 133 A.L.R. 1500; *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 96 L. Ed. 469, 72 S. Ct. 405.

Chapter 18 does not destroy the business property or the business of the Appellants, but rather, it simply prohibits the use of gambling devices which were only incidental to their business and does not discriminate, but is equal as to all coming within the purview of the statute.

It is submitted that Chapter 18 is not arbitrary and that the Appellant has not sustained the burden of showing that "it does not rest upon any reasonable basis." The Appellee has suggested a basis for the Act which is certainly reasonable.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the Appellee's Motion to Dismiss the Appeal, or in the alternative to affirm the Judgment of the Court of Appeals of Maryland, should be granted.

Respectfully submitted,

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